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No Judicial Dyslexia: The Custodial Parent Presumption Distinguishes the Paternal from the Parental Right to Name a Child

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I. INTRODUCTION

When confronted with parents disagreeing about the name of their child, modern courts may resolve the conflict by presuming that the custodial parent acts in the child's best interest. An objecting noncustodial parent must overcome this presumption by proving that the custodial parent's decision threatens the child's welfare according to the standards of the states. This presumptive scheme, herein referred to as the "custodial parent presumption," merits consideration in a society where divorce frequently occurs, providing the ground for the name battle. When divorced parents remarry they extend the area for dispute. Traditionally, courts...
have analyzed "paternal" rights in naming rather than "parental" rights. These courts have held that the paternal surname should not be changed unless the father has been given notice, has committed a heinous act, has failed to support his child, or has given the child up for adoption. Although most courts state that only the child's best interest should be considered, the "best interest of the child' test has customarily favored the father-child relationship." 

This Note will discuss whether courts should continue to emphasize the paternal naming right rather than recognize a parental naming right that arises from a court's determination of custody. Examination of the custodial parent presumption entails a three-part analysis — the definition of the custodial parent presumption, the legal significance of a name, and the application of the custodial parent presumption to hypothetical situations to reveal the advantages and disadvantages of the model. With this

9. See, e.g., Cohee v. Cohee, 210 Neb. 855, 317 N. W. 2d 381 (1982) (granted hyphenated name, with father's name first, because father had not been guilty of misconduct, nor had he failed to support the child).
10. In re Saxton, 309 N. W. 2d 298 (Minn. 1981) (denied addition of maternal name to paternal surname because father wrote letters, called, sent presents, and had custody for one month), cert. denied, 102 S. Ct. 1787 (1982); Robinson v. Hansel, 302 Minn. 138, 223 N. W. 2d 138 (1974) (denied addition of stepfather's name to paternal surname because a change could sever the weak parental bond).
13. This Note describes the history of name changes arising out of litigation concerning a woman's right to her own name rather than the determination of custody. Dr. Ralph Slovenko, professor of law and psychiatry, offers the same historical perspective:

Forbush v. Wallace, decided in 1971, particularly roused women because the United States Supreme Court rejected the constitutional attack on an unwritten Alabama regulation requiring a married woman to register for a driver's license using her husband's name. Forbush v. Wallace, 341 F. Supp. 217, 223 (M. D. Ala. 1971), aff'd without opinion, 405 U. S. 970 (1972). Eleven years later the Supreme Court of Alabama granted women the right to have their driver's licenses in their own names. The court distinguished Forbush on the ground that the petitioner had inaccurately conceded that the common law required her to assume her husband's name upon marriage. State v. Taylor, 415 So. 2d 1043, 1047 (Ala. 1982). See infra note 134 and accompanying text. See generally Daum, The Right of Married Women to Assert Their Own Surnames, 8 U. Mich. J. L. Rev. 63 (1974); Karst, A Discrimination So Trivial: A Note on the Law and the Symbolism of Women's Dependancy, 35 Ohio St. L. J. 546 (1974); MacDougall, Women's, Men's, Children's Names: An Outline and Bibliography, 7 Fam. L. Rep. 101 (1981); Comment, Surname Alternatives in Pennsylvania, 82 Dick. L. Rev. 101 (1977); Comment, Women's Name Rights, 59 Marq. L. Rev. 876 (1976) [hereinafter cited as Comment, Women's Name Rights]; Comment, Married Women and the Name Game, 11 U. Rich. L. Rev. 121 (1976) [hereinafter cited as Comment, Name Game].
analytic foundation, courts can thus assess the merits of the custodial parent presumption as an alternative to the traditional patronymic naming system.  

II. DEFINITION OF THE CUSTODIAL PARENT PRE-SUMPTION

The primary focus of the custodial parent presumption is custody. An implicit proposition of the custodial parent concept is that a name is an important factor in the child's development. Traditionally, courts have regarded the decision to change a child's name as a paternal rather than a parental right arising from the award of custody. These courts discerned the right to name a child, see O'Brien v. Tilson, 523 F.2d 827 (Alaska 1976). The L.A.M. court found that "a review of literature, including case law, treatise, and law review, indicates that . . . [one parental right] protected . . . by the Constitution . . . [is] the right to have a child bear the parent's name." Id. at 832 n.13. This right remains even after custody is placed in another. The custodial parent's power, however, is not absolute. Id.

A broader definition is also possible. A stepfather may arguably be a custodial parent because he may incur the detriment of support if the marriage dissolves. See, e.g., Kelley v. Iowa Dep't of Social Servs., 197 N.W.2d 192 (Iowa 1972). The Kelley court reasoned that "a step-parent who is living with his step-children (in loco parentis) . . . is obligated to support them." Id. at 199. For a discussion that implicitly recognizes the stepfather's role in rearing—affording rights as well as duties, see Blustein, Child Rearing and Family Interests, in Having Children: Philosophical and Legal Reflections on Parenthood 115-22 (1979). The author states:

[T]he source of child-rearing duties lies not in procreation but in social practices and in the legitimate interests of various parties in these practices.

Legitimate social interests in child-rearing practices include the following: first, an interest in the maintenance of a certain level of procreation, and in the physical care, education, and socialization of the child; second, an interest in seeing that the institutions responsible for carrying out these tasks mesh with other social institutions.

[The children's duties are] facilitation [of] and non-interference [with] . . . the [parent's] duties to care for, educate, and socialize their children.

Id. at 117, 119-20. See also Stanley v. Illinois, 405 U.S. 645 (1972) (to be named custodial parent upon the mother's death, stepfather must show that he had actually nurtured the children).

For a discussion of other definitions of custody, see M. Morgenbesser & N. Nehls, Joint Custody 27-43 (1981).

14. The phrase "patronymic naming system" signifies the perpetuation of the paternal preference in naming children. The word patronymic means "a name derived from that of the father or a paternal ancestor usually by the addition of a prefix or suffix (as in MacDonald, son of Donald, or Ivanovich, son of Ivan)." Webster's Third New International Dictionary 1656 (4th ed. 1976).

15. In re Schiffman, 28 Cal. 3d at 648, 620 P.2d at 584, 168 Cal. Rptr. at 923 (Mosk, J., concurring). A narrow definition of a custodial parent refers to the natural parent who has the legal right to custody of the child. See, e.g., L.A.M. v. State, 547 P.2d 827 (Alaska 1976). The L.A.M. court found that "a review of literature, including case law, treatise, and law review, indicates that . . . [one parental right] protected . . . by the Constitution . . . [is] the right to have a child bear the parent's name." Id. at 832 n.13. This right remains even after custody is placed in another. The custodial parent's power, however, is not absolute. Id.

16. Judge Mosk in In re Schiffman, does not attempt to rank the importance of a name but recognizes that a name contributes to the child's well-being and adjustment in society. 28 Cal. 3d at 648, 620 P.2d at 583, 169 Cal. Rptr. at 923. For discussion of the importance of the parental right to name a child, see O'Brien v. Tilson, 923 F. Supp. 494 (E.D.N.C. 1981) (name statute that limits parental choice unconstitutionally impinges upon decisions affecting family life, procreation, and child-rearing); Jech v. Burch, 466 F. Supp. 714, 719 (D. Hawaii 1979) (parents have a common law right to give their child any name they wish, and the fourteenth amendment protects this right from arbitrary state action); Rice v. Department of Health and Rehab. Servs., 386 So. 2d 844 (Fla. Dist. Ct. App. 1980) (Booth, J., dissenting) (personal choice is of "great importance"); Secretary of Commonwealth v. City Clerk, 373 Mass. 178, 366 N.E.2d 717, 724 (1977) (constitutional right to family autonomy protects parents' right to select even a foolish name); D'Ambrosio v. Rizzo, 81 Mass. App. Ct. 1539, 425 N.E.2d 369 (App. Ct. 1981) (naming of a child is a right and a privilege belonging to the child's parents). See also infra note 190.

17. See, e.g., Carroll v. Johnson, 263 Ark. 280, 565 S.W.2d 10 (1978); In re Spatz, 199 Neb. 332,
child as a right different from that of the custodial parent to determine the child’s environment, education, and religion. \(18\) Courts therefore have implied that the naming right is so important that it mandates judicial intervention. \(19\)

A custodial parent, however, is presumed to be a fit parent and to act in the child’s best interests. \(20\) This presumption exists because at the original determination of custody a court evaluates numerous factors in deciding who is to receive the rights and responsibilities of a custodial parent. \(21\) Even if both parents are fit, a court nonetheless must choose the parent who will make significant decisions about a child’s welfare. \(22\) The decision about a child’s name should logically be a responsibility incidental to custody. \(23\) An understanding of the custodial parent presumption therefore entails an overview of the original custody determination.

This determination is based on the child’s best interest. \(24\) There are three salient aspects of the child’s best interest test—the purpose of the test, the factors courts consider, and the relationship of the custodial parent presumption to the tender years doctrine.

A. Purpose of the Child’s Best Interest Test

In attempting to resolve name disputes, courts frequently borrow the words “child’s best interests” from custody case law and then ascribe a different connotation to these words. \(25\) Courts

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\(25\) See supra notes 6-12 and accompanying text.
generally interpret the child's best interest in terms of the patronymic naming system.\textsuperscript{26}

The primary reason for the court's adherence to the traditional male preference arises from a common factual pattern. The mother, who has custody, seeks to have the child bear the stepfather's surname, which she had adopted as her own.\textsuperscript{27} With the child in a new environment, courts state that retention of the paternal surname will strengthen the "tenuous paternal bond."\textsuperscript{28} This interpretation thus suggests a dispute between two males, the natural father and the stepfather, rather than between the noncustodial parent's lack of authority and the custodial parent's right to make significant decisions.\textsuperscript{29}

Courts preserve the paternal naming right by creating the presumption that a name can be changed only when the substantial welfare of the child requires it;\textsuperscript{30} when the custodial mother presents substantial evidence, justifying the change;\textsuperscript{31} or when there is "clear, cogent, and convincing evidence that such change will significantly advance the interests of the child."\textsuperscript{32} Only when the father abandons\textsuperscript{33} the child or commits a criminal act that denigrates the family name would the father's consent be unnecessary.\textsuperscript{34} The presumption preserving the male naming right therefore seems to place an almost impossible burden upon a

\textsuperscript{26} See supra note 12 and accompanying text.

\textsuperscript{27} Attorney Priscilla Ruth MacDougall ranks the frequency of fact patterns in the following manner: "[A] change to the stepfather's name which the mother has adopted as her own, rarely as a change to the mother's name, and then in situations where she has not remarried." Appellant's Petition for Writ of Certiorari to the Supreme Court of the United States at 28 n.11. \textit{In re Saxton}, 309 N.W.2d 298 (Minn. 1981), \textit{cert. denied}, 102 S. Ct. 1737 (1982). These general patterns arise either from the mother's filing of a petition in accordance with a statute with the father then opposing, or from the child's pursuit of a common law name change, with the noncustodial parent seeking an injunction to compel retention of the original surname. Mark v. Kahn, 333 Mass. 517, \textit{---}, 131 N.E.2d 758, 761 (1956).

\textsuperscript{28} See, e.g., \textit{Carroll v. Johnson}, 265 Ark. 242, 565 S.W.2d 10 (1978) (change could erode bond); Mark v. Kahn, 333 Mass. 517, 131 N.E.2d 758 (1956) (if child's name is changed, the parental bond may be weakened or destroyed).

\textsuperscript{29} A court's discussion of the paternal bond usually means that it will deny the name change because either the divorce has weakened the paternal bond or because the presence of a child support payment has strengthened the bond. See, e.g., Robinson v. Hansel, 302 Minn. 34, 223 N.W.2d 709, 711 (Ct. App. 1974) (even though a divorce decree terminates a marriage, courts have traditionally tried to maintain and encourage continuing parental relationships); \textit{In re Harris}, 236 S.E.2d 426 (W. Va. 1977) ("[F]ather who exercises his parental rights has a protectable interest in his children bearing his surname and this interest is one \textit{quid pro quo} of his reciprocal obligation of support and maintenance.").

\textsuperscript{30} \textit{In re Spatz}, 199 Neb. 332, 256 N.W.2d 814, 815 (1977).

\textsuperscript{31} Norton v. Norton, 268 Ark. 791, 793, 595 S.W.2d 709, 711 (Ct. App. 1980).


mother who determines that a name change would benefit her child. Some courts, however, find that the stringent burden of proof does not discriminate against women because both parents have equal naming rights at a child's birth. These courts fail to consider that the origin of the naming preference for the father came from the traditional status of the male as head of the household. Consequently, today few couples probably know of their naming options.

The purpose of retaining the paternal surname is sometimes linked to the amount of support, usually described in monetary terms, that the noncustodial father gives the child. With this orientation, courts view the change from the paternal surname as one that separates the child from his or her father. This interpretation thus implies that change is detrimental to the child.

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35. In re Saxton, 309 N.W.2d 298 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982). The Saxton decision demonstrates a court's reluctance to change a child's paternal name. Both the custodial mother and the children, ages seven and nine, wanted to add the maternal surname to the paternal surname. Psychologists also thought the hyphenated name would be beneficial to the children's mental health. The noncustodial father, who lived in another state and fulfilled child support obligations, protested the change, stating that his son was the "only male heir of the Dennis surname, as I am an only child and my father is an only child." Appellant's Brief at 36a, In re Saxton, 309 N.W.2d 298 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982). The Supreme Court of Minnesota upheld its standard that the custodial parent must offer clear and compelling evidence that the substantial welfare of the child necessitates a change. 309 N.W.2d at 301. Although the court stated that the children's preferences should have been considered, as they are in custody proceedings, it rejected the constitutional attacks based on the assumption that the paternal name is given preference. The court stated that due deference should be given to the fact that the child has borne a given name for an extended period of time. Id. at 302.

The dissent favored the child's best interest standard for hyphenated names. Id. The dissent reasoned that "a change of the minor's surname "would be appropriate where the change is beneficial for the child, even though the given name is not detrimental to the child's well-being." Id. at 303 (Wahl, J., dissenting).

36. See, e.g., Cohee v. Cohee, 210 Neb. 855, 317 N.W.2d 381 (1982). In Cohee the Supreme Court of Nebraska granted the objecting father's wish to add the paternal name and to place it first in the hyphenated name on the birth certificate. The lower court had ordered the mother to amend the birth certificate to the surname of the father (Cohee) or to the hyphenated name (Dugger-Cohee). Id. at 382. The supreme court considered the naming issue de novo. It found that the father's name should be first, offering no explanation for de novo review or for its decision to change the position of the father's name. Id. at 384.


38. In re Harris, 236 S.E.2d 426 (W. Va. 1977). The West Virginia court stated: "The weight of authority appears to be that absent extreme circumstances a father who exercises his parental rights has a protectable interest in his children bearing his surname and this interest is one quid pro quo of his reciprocal obligation of support and maintenance." Id. at 429.

39. In D.R.S. v. R.S.H. the dissent criticized the trial court's statement that if the mother wanted the child to bear her name, child support payments should be reduced. D.R.S. v. R.S.H., Ind. App. __, __ (Ind. App. 1980) (narrowed by J.L.A. v. T.B.S., Ind. App. __, __, 440 N.E.2d 439 (Ind. App. 1982)). The dissent also disliked the following statement made by the trial court: "If they want to play women's lib, then let them call it all by themselves." Id. See West v. Wright, 263 Md. 297, 283 A.2d 401 (1971); In re Williams, 86 Misc. 2d 57, 381 N.Y.S.2d 994 (Civil Ct. 1976).


41. Two courts are so against change that they refused to allow even the addition of the maternal surname to the paternal name. Laks v. Laks, 25 Ariz. App. 58, __, __ (Ariz. App. 1975); In re Saxton, 309 N.W.2d 298, 302 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982).
But such an implication does not arise when a custodial parent exercises his or her right to change a child’s physical environment, educational development, or spiritual orientation. 42

**B. FACTORS COURTS CONSIDER IN NAMING DISPUTES**

By discarding the presumption that the father has a primary right to have his child bear his name, courts could attempt to resolve the naming dispute in terms of the child’s best interest test. 43 Using this test, courts would consider the child in relationship to both parents. 44 In 1980 the Supreme Court of California in *In re Schiffman* 45 explicitly advocated the child’s best interest test in a naming dispute. 46

In *Schiffman* the custodial mother appealed an order that changed the child’s surname from the mother’s birth name to the father’s surname. 47 The majority opinion explicitly declared that the traditional paternal presumption be abolished. 48 The concurrence by Judge Mosk would recognize a presumption that the custodial parent acts in the best interest of a child of tender years when selecting a name. 49

The majority opinion in *Schiffman* expressly disapproved of its earlier decisions that awarded the primary naming right to the father. 50 The majority approved the use of certain factors to determine the child’s best interest in addition to the factor of preserving the male naming right. 51 These factors include the strength of the mother-child relationship, the identification of the

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42. *In re Schiffman*, 28 Cal. 3d at 649, 620 P.2d at 585, 169 Cal. Rptr. at 923.
43. Section 402 of the Uniform Marriage and Divorce Act describes the best interests of a child:

> The court shall determine custody in accordance with the best interest of the child.

> The court shall consider all relevant factors including:

> (1) the wishes of the child’s parent or parents as to his custody;

> (2) the wishes of the child as to his custodian;

> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child’s best interest;

> (4) the child’s adjustment to his home, school, and community; and

> (5) the mental and physical health of all individuals involved.

> The court shall not consider conduct of a proposed custodian that does not affect the relationship of the child.

44. A court’s acceptance of the tender years doctrine, however, affects how the court evaluates both parents. See infra notes 79-93 and accompanying text.
45. 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980).
47. Id. at 641-42, 620 P.2d at 580, 169 Cal. Rptr. at 919.
48. Id. at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922.
49. Id. at 648, 620 P.2d at 584-85, 169 Cal. Rptr. at 923.
50. Id. at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922.
51. Id. at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922-23.
child as part of a family unit, and the embarrassment or discomfort that a child may experience when he bears a surname different from that of the rest of his family. An additional factor involves the balancing of the symbolic role that a surname other than that of the natural father may play in fostering familial bonds against the importance of maintaining the biological father-child relationship. These factors thus lessen the primacy of the paternal naming right because the court reduced the paternal right to a factor, not the factor. The court must also consider the bonds between the child and his or her mother, siblings, and stepfather if they are a part of the family unit.

Concurring Judge Mosk, however, views these factors as having been considered previously at the custody determination and finds the naming right to be an incident of custody. A custodial parent's decision about a name would be "just one in a long list of ingredients contributing more or less to the child's well-being and adjustment in society.

When declaring that the custodial parent presumptively acts in the child's best interest, Judge Mosk, without any elaboration, states that the general function of the custodial parent presumption is to maintain the status quo. Two contrasting definitions of status quo are possible. One interpretation is that to change a child's name alters the status quo by the very fact of change. This interpretation suggests two different strengths of presumptions. First, the custodial parent would presumptively have the right to select a name and the noncustodial parent would have to overcome a heavy burden because mere selection does not alter the status quo. Second, the custodial parent would presumptively have the right to change a name but the noncustodial parent, generally the father, could easily rebut the presumption because a change of the

52. Id.
53. Id.
54. Id. at 648, 620 P.2d at 584, 169 Cal. Rptr. at 923 (Mosk, J.; concurring).
55. Id.
56. In Solomon v. Solomon the Illinois Appellate Court used the phrase "incidental to the custody of the child" to describe its jurisdiction. Solomon v. Solomon, 5 Ill. App. 2d 297, 301,125 N.E.2d 675, 678 (Ct. App. 1955). Other state courts have considered significant the fact that one parent has custody. See Webber v. Parker, 167 So. 2d 519 (La. Ct. App.) (to select given name), writ refused, 264 La. 886, 168 So. 2d 269 (1964); State ex rel Spence-Chapin Servs. to Families & Children v. Tedeno, 101 Misc. 2d 485, 421 N.Y.S.2d 297 (Sup. Ct. 1979) (to select surname).
57. 28 Cal. 3d at 648, 620 P.2d at 584, 169 Cal. Rptr. at 923 (Mosk, J., concurring).
58. Id. at 650, 620 P.2d at 585, 169 Cal. Rptr. at 924.
59. The Supreme Court of Nebraska recently recognized that neither parent has a superior right to determine the initial name. Cohee v. Cohee, 210 Neb. 855, ___ , 317 N.W.2d 381, 384 (1982).
child's previous name would alter the status quo. Courts would interpret these two presumptions in light of their general view of presumptions. 62

The facts of Schiffman 63 suggest this presumptive weighing. In Schiffman the couple separated after six months of marriage and a child was born five months later. The court noted that in this situation the factor of how long a child had borne the father's name was insignificant. 65 The logical inference is that this factor would be significant in a name change proceeding. Therefore, the weight ascribed to the father's naming right would be strengthened because such a name change symbolizes an alteration of the status quo. 66 The rationale for the dichotomy - naming at birth and name changing - is unclear. 67

To avoid this illogical interpretation, a court must therefore define maintenance of the status quo, not in terms of how long a child had a particular surname, but rather in terms of maintaining

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61. See, e.g., In re Saxton, 309 N.W.2d 298 (Minn. 1981) (court gave great weight to the child's previous use of a surname, regardless of whose surname was originally given), cert. denied, 102 S. Ct. 1737 (1982); In re Tubbs, 620 P.2d 384 (Okla. 1980) (every divorced parent whose paternal or maternal bond remains unsevered has a claim to his or her child continuing to bear the same legal name as that by which it was known at the time the marriage was dissolved).


64. Id. at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922.

65. Id. at 642, 620 P.2d at 580, 169 Cal. Rptr. at 919.

66. Id.

67. A recent Note discerned that a distinction between naming at birth and name changing may occur if a court purports to assert the importance of the child's best interest while in effect recognizing the predominance of the paternal right:

[It] seems ironic that while the child's surname is regarded as unimportant in establishing his relationship with his natural father, it would seem to be considered
the custodial parent's right to make decisions regarding the care of the child. Maintenance of the status quo would thus refer to the custodial parent's right to make a decision, not to maintaining a static environment for the child. Judge Mosk suggests that the "accustomed environment," controlled by the custodial parent, is in the child's best interest. The noncustodial parent's right thus exists when he or she can show "new facts and circumstances subsequent to the original custody order" that signify that the custodial parent does not act in the child's best interest. Judge Mosk explains this rebuttable presumption by referring to the noncustodial parent's right to object to the religious training of a child. Because the custodial parent presumptively acts in the child's best interest, the noncustodial parent must overcome the heavy burden of proving that the "health or well-being of the child is being injured by the choice of religious practices."

Legal antecedents, described in a statute and in case law, further explain the custodial parent presumption. A Pennsylvania statute expressly describes the custodial parent's right to select a name at birth: "If the parents are divorced or separated at the time of the child's birth, the choice of the surname rests with the parent who has custody." The appellate court of Louisiana expressed a similar view in declaring that the noncustodial father bore the burden of proving that the given name, rather than the surname, was "detrimental to the present or future welfare of a child" who was born pending a suit for the parents' separation. A clear statement that the custody of an infant is an important factor was made by a superior court of New York: "[T]he significant consideration is that the mother has custody and it is she who will be the primary caretaking figure and who will make major

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68. See, e.g., In re Schiffman, 28 Cal. 3d at 649, 620 P.2d at 585, 169 Cal. Rptr. at 925 (Mosk, J., concurring).
69. Id.
70. Id.
71. Id.
72. Id.
73. See generally H. Hill Kay, Sex Based Discrimination 171-77 (2d ed. 1981) (examines relationship of father's primary right, the child's best interest test, and the custodial parent presumption).
74. PA. STAT. tit. 28, § 1.7(b) (1975).
decisions’’ for the child. In this case the court also considered the child’s wishes, a common factor in custody suits. The court presumed that the child would prefer to use the name of the parent with whom she was living.

The custodial parent presumption thus accords with a court’s award of custody by affording the custodial parent the same presumptive right to select or change a child’s name as it does with respect to the right to select or change a child’s religion, education, or general environment. A court’s view of the custodial parent presumption will thus logically relate to its approach to the awarding of custody.

C. RELATIONSHIP OF THE CUSTODIAL PARENT PRESUMPTION TO THE TENDER YEARS DOCTRINE

When a court determines a child’s best interest in a custody or name change proceeding, its perception of the child’s best interest relates to its view of the tender years doctrine because both legal concepts deal with related but distinct presumptions. The presumption of the tender years doctrine is that if both parents of a young child are fit, the mother is the better custodial parent. A court’s view of this maternal presumption must be distinguished from its interpretation of the gender neutral custodial parent presumption.

In Devine v. Devine the Supreme Court of Alabama held the tender years presumption to be an unconstitutional gender based classification that discriminates between father and mother solely on the basis of sex. In making the custody determination gender neutral, the court lists factors to be considered in awarding custody. These factors are similar to those that courts have considered in resolving naming disputes:

The sex and age of the children are indeed very important considerations; however, the courts must go beyond these to consider the characteristics and needs of each child, including their emotional, social, moral, material and educational needs; the respective home environments

77. Id. at ___, 421 N.Y.S.2d at 300.
78. Id.
79. Uviler, supra note 5, at 113-14.
offered by the parties; the characteristics of those seeking custody, including age, character, stability, mental and physical health; the capacity and interest of each parent to provide for the emotional, social, moral, material and educational needs of the children; the interpersonal relationship between each child and each parent; the interpersonal relationship between the children; the effect on the child of disrupting or continuing an existing custodial status; the preference of each child, if the child is of sufficient age and maturity; the report and recommendation of any expert witnesses or other independent investigator; available alternatives; and any other relevant matter the evidence may disclose.  

In listing these factors the court notes that the common law origin of "the tender years presumption and the best interests of the child [doctrine] have grown side by side." Therefore, courts have presumed that the child’s best interest means that the mother should be the custodial parent. Because of this historical relationship the custodial parent presumption would be suspect in those states that have not expressly abandoned or abolished the tender years doctrine, but only if those states failed to recognize two important facts.

First, courts have traditionally interpreted the child’s best interest in terms of the paternal naming right. This discriminatory practice of preserving the patronymic naming system was the impetus for the Schiffman court’s declaration that the child’s best

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83. Devine, 398 So. 2d at 696 n.8.
84. Id.
85. Id. at 691 n.4. The Devine court lists the following states as those retaining the tender years doctrine: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Nebraska, New York, North Carolina, Ohio, Texas, and Washington. The validity of the doctrine is questionable in the following states: Kansas, Oregon, Pennsylvania, and Vermont. Id. at 691 n.5. Even in those states where there is a state’s equal right amendment or similar statutory language, the presumption remains valid: Louisiana, Maryland, Minnesota, and Utah. Id. at 691 n.6. In the following 22 states the doctrine remains in some form: Alabama, Arkansas, Florida, Idaho, Kentucky, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, Wisconsin, and Wyoming. Id. at 691 n.3. But see, e.g., Uviller, supra note 5, at 114 (author interprets statutory silence on the subject as an implied statement that the best interests of the child govern). Uviller, contrary to what she believes are feminist views, supports the use of the maternal presumption, finding that the economic context of custody suits will severely disadvantage women if the presumption is declared unconstitutional. Id. at 117.

The presumption may be constitutional from the viewpoint of the United States Supreme Court. See Arends v. Arends, 517 P.2d 1019, 1020 (Utah 1974) (custodial father of a one-year-old girl whose mother had been psychotic was forced to relinquish custody to the mother who had recovered when the child was four years old), cert. denied, 419 U.S. 881 (1975).
86. Note, supra note 12, at 323.
interest test means considering the child’s best interests, not just the paternal preference.87 In practice, courts did not relate the child’s best interests in resolving naming disputes to the prior determination of custody, even though “the tender years presumption and the best interests of the child have grown side by side.”88

The other important fact courts must recognize is that the gender neutral language of the custodial parent presumption does not violate the equal protection clause89 of the United States Constitution.90 If the custodial parent presumption were legislatively adopted91 or judicially promulgated the language of the presumption would be facially neutral.92 Even though the presumption would adversely affect men because courts infrequently award custody to fathers, the classification does not intentionally discriminate against men.93 The classification does not meet the “but for” test that signifies the presence of discriminatory intent.94 Deference to the custodial parent’s decision is not a euphemism for giving control to the mother.95 Such deference simply recognizes the custodial parent’s right to make an important decision.96

In conclusion, the right to select or change a child’s name logically coexists with other custodial rights.97 To resolve the naming dispute, a court need not reevaluate the traditional factors comprising the child’s best interest test because the award of custody creates the presumption that the custodial parent’s decision is in the child’s best interest. The noncustodial parent thus must bear the burden of proving facts to show a change of conditions subsequent to the original court determination of custody. The rebuttable character of the custodial parent presumption, though allowing judicial intervention upon a showing of significant facts,
maintains the status quo by protecting the custodial parent's right to make important legal decisions about a child's development.

III. THE LEGAL SIGNIFICANCE OF A NAME

Parental disputes about a child's name suggest the significance of a name, although the basis of the disagreement could be acrimony between former spouses. Judge Mosk recognizes the naming decision to be a significant decision. Various aspects of a name reveal the basis of this assumption: The common law and statutory mechanisms provide means for effectuating the family's right to select its members names.

A. Common Law and Statutory Interpretations of Naming

The essence of a common law name change is the consistent use of a name, absent a fraudulent or deceitful motive. This right extends not only to adults but also to children. This broad basis for a name change continues today when courts hold that there is no property interest in a name, that a person's name need not be

98. Judge Mosk related the significance of a name decision to aspects of a child's well-being. In re Schiffman, 28 Cal. 3d at 648, 620 P.2d at 584, 169 Cal. Rptr. at 923 (Mosk, J., concurring).
99. To protect the child's best interest some observers have argued that the custodial parent should be sole arbiter of the noncustodial parent's visitation rights. See J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child 38 (1973). In examining the tender years doctrine, however, author Uviller believes that this proposal would "be strong incentive to yet bloodier battles over which parents get custody in the first place." Uviller, supra note 5, at 117 n.29. Acceptance of the custodial parent presumption may similarly, but to a lesser extent, heighten the conflict in the original custody determination.
100. In re Schiffman, 28 Cal. 3d at 648, 620 P.2d at 584, 169 Cal. Rptr. at 923.
101. One writer has suggested that the court may find that the decision to select or change a name is so significant that, even if the custodial parent presumptively acts in the child's best interest, the court is the only proper forum for a name change, requiring a statute that abrogates the common law right to change one's name at will, absent a fraudulent or illegal motive. Comment, Name Game, supra note 13, at 150-51. But this view fails to account for the constitutionally protected right to family autonomy. See infra notes 190-201 and accompanying text.
103. In re Staros, 280 N.W.2d 409, 411 (Iowa 1979). The Staros court emphasized that the California court in In re Trower, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (Ct. App. 1968), failed to supply any authority for the proposition that at common law a minor did not have a right to a name change. 280 N.W.2d at 411. See Burk v. Hammonds, 586 S.W.2d 307 (Ky. Ct. App. 1979) (child may exercise common law right, but statutory right is vested in parent); Hall v. Hall, 30 Md. 214, 351 A.2d 917 (1976) (minor has right to common law and statutory name change, but court determines child's best interest in statutory proceedings).
104. Hosmer v. Hosmer, 611 S.W.2d 32 (Mo. Ct. App. 1980) (a name cannot be consideration for an antenuptial contract, for there is no legal right to preclude the giving of a paternal surname to
the exclusive name, or that a statute provides court documentation of a name change as an alternative to the common law method.

A statute abrogates the broad common law right when a court recognizes a liberty interest in a person's name and declares that the statute is the exclusive method for a name change. One writer has suggested that the apparent level of discretion exercised by a court signifies its interpretation of statutes in relationship to the common law: minimum, when the only basis for denial is fraud; intermediate, when the court considers other factors; and maximum, when the court requires a showing of "good cause."

These different levels of discretion could affect a court's interpretation of the custodial parent presumption. A court could superimpose its level of discretion upon the weighing of the presumption favoring the custodial parent: a minimal level of discretion could give strength to the presumption, almost creating categorical protection for the custodial parent's decision; and a maximum level of discretion could weaken the presumption, creating a balancing process, with the presumption characterized as a thumb on the scale of the custodial parent.

In addition to the burden of proof suggested by statutes, a court may discern a heavy burden of proof for a noncustodial parent seeking an injunction or other extraordinary relief. The
extraordinary nature of an injunction could suggest that a court would give great weight to the custodial parent presumption.

A court will also interpret the presumption in light of the family’s interest in naming because the custodial parent presumption describes a relationship between the custodial parent and child and suggests a limited right in the noncustodial parent.

B. The Family’s Interest in a Name

The court in resolving the naming dispute between two parents may base its decision on how the law has recognized various interests related to the family. Litigation concerning family members has recognized four rights:115 the husband-father’s right to his own name, the wife-mother’s right to her own name,116 the paternal and maternal right to due process and equal protection, and the parental right to name a child. How a court relates these familial rights to the unit consisting of the custodial parent and child logically depends upon the court’s interpretation of what constitutes “a family.”

1. The Husband-Father’s Right to His Own Name

At common law there was no interest in a name because a person could change his name absent a fraudulent purpose.117 But a husband would sometimes adopt his wife’s surname to receive a substantial inheritance.118 Today a husband may be unsuccessful in asserting the exclusive right to his own name after a divorce.119 In

115. The child’s interest in his or her name is generally given some consideration, but the child’s preferences are not controlling. In re Saxton, 309 N.W.2d 298, 302 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982).

116. The Center for a Woman’s Own Name stated that its position was that “the name(s) the woman chooses to use is her own name. It may be the name given, a name assumed during childhood, assumed at marriage, assumed at a previous marriage, a hyphenated name as in a name made up by herself at any time.” CENTER FOR A WOMAN’S OWN NAME, BOOKLET FOR WOMEN WHO WISH TO DETERMINE THEIR OWN NAME AFTER MARRIAGE 6 (1974). See also In re Schiffman, 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980) (court used the expression “birthname” in substitution for the traditional label of “maiden name”). But see Secretary of Commonwealth v. City Clerk, 373 Mass. 178, ___, 366 N.E.2d 717, 724 (1977) (maiden name “is the name used before her first marriage”). Author Susan Ross interprets a woman’s name in terms of patronymic naming:

The author finally decided on “father’s name” because she wished to emphasize that most people in our society still give their children the surname of the father. Many feminists have been combatting the custom of a woman’s changing her name to that of the husband at marriage, but they have ignored the male-oriented system for naming children. By using the term “father’s name,” the author hopes to encourage more women to see and combat the second problem.


118. See Comment, Name Game, supra note 15, at 127 n.41.

119. See, e.g., Welcker v. Welcker, 342 So. 2d 251 (La. Ct. App. 1977) (ex-husband could not bar his ex-wife from using his surname even though they had been married less than a year).
such a case a court reveals the continuing vitality of the common law when granting, over objection, an ex-wife the right to use her ex-husband’s name and when recognizing a wife’s right to name her children by a previous marriage.

2. The Wife-Mother’s Right to Her Own Name

In contrast, the issue of a wife’s right to use her own name, rather than her husband’s, demands a more thorough discussion of the various situations in which courts gradually recognized this right. The term “lucy stoner” signifies the onset of the movement toward recognition of this right. In 1855 Lucy Stone retained her birth name when she married Henry B. Blackwell. Her influence later prompted Jane Grant and Ruth Hale in 1921 to found the Lucy Stone League.

In the 1970s the interest in women’s names heightened when the Supreme Court of the United States, in Forbush v. Wallace, upheld Alabama’s regulation requiring a woman to register for her driver’s license using her husband’s surname. The Court, affirming per curiam, found the regulation to be rationally related to the state’s interest in custom, uniformity, and administrative convenience. Five years later, the district court of Kentucky in Whitlow v. Hodges found Forbush to be persuasive and upheld Kentucky’s unwritten regulation that required a woman to use her husband’s name to receive a driver’s license. The Supreme Court of the United States denied certiorari. In 1982, however,

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120. Cowley v. Cowley, 1901 A.C. 450 (House of Lords allowed the ex-wife of Lord Cowley the right to be known as "Cowley" even though she had remarried).
121. Winkenhofer v. Griffin, 511 S.W.2d 216 (Ky. Ct. App. 1974) (Kentucky court rejected the stepfather’s claim that a name change will insinuate to the public that the child was his illegitimate child). See generally In re Dunston, 18 N.C. App. 647, 197 S.E.2d 560 (Ct. App. 1973) (court allowed the name change for a child who had been known for 15 years by her unwed father’s name).
122. See generally Daum, supra note 13; Lamber, A Married Woman’s Surname: Is Custom Law?, 1973 WASH. U.L.Q. 779; Comment, Women’s Name Rights, supra note 13, at 876; Comment, Name Game, supra note 13, at 142.
123. See supra note 13.
124. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1344 (4th ed. 1976) (defines a “lucy stoner” as “a female advocate of women’s rights; esp: a married woman who uses her maiden name as a surname”).
125. MacDougall, Married Women’s Common Law Right to Their Own Surnames, 1 WOMEN’S RIGHTS L. REP. 2, 5 (1972).
126. Id.
129. 341 F. Supp. at 222. These interests, however, have not withstood judicial scrutiny when the court discerns gender discrimination. See, e.g., Reed v. Reed, 404 U.S. 71, 76-77 (1971) (rejected state’s claim of administrative ease).
130. 539 F.2d 582 (6th Cir.), cert. denied, 429 U.S. 1029 (1976).
132. 539 F.2d at 583-84.
the Supreme Court of Alabama overruled Forbush, declaring that Forbush did not accurately state the broad right to a common law name change.

The Forbush and Whitlow decisions of the 1970s did not, however, preclude women from using their names in this context and others. Other courts interpreted their state common law and held that the common law did not require a married woman to assume her husband's name. Therefore, by finding their common law different from Alabama's, state courts have recognized a woman's right to retain her name upon marriage.

A few months after Forbush, the Maryland Court of Appeals recognized a woman's right to register to vote using her own name, and the Arkansas statutory requirement of registering as "Ms." or "Mrs." was later declared unconstitutional. Courts soon recognized a woman's right to use her birth name in a variety of contexts: the right to confirm her decision with a court order, the right to resume her name after having previously used her husband's, the right to use general name change statutes even if divorce laws bar change, the right to register for group insurance, and the right to obtain a driver's license.

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134. Id. at 1047. The Taylor court quoted Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458 (1975), for an accurate statement of the common law right:

> When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage.

415 So. 2d at 1047.

The Taylor decision also undermines the holding of Whitlow, 539 F.2d 582 (6th Cir.), cert. denied, 429 U.S. 1029 (1976), because the Whitlow court adopted the Forbush court's rationale. Whitlow, 593 F.2d at 589-84. See Memorandum, Ky. DEPT. TRANSP. (Oct. 30, 1981) (Kentucky Department of Transportation allowed to issue driver's licenses to married women in their own names).

135. See, e.g., Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458 (1975) (court did not mention Alabama and Kentucky's unusual interpretation of the common law).
136. See, e.g., In re Natale, 527 S.W.2d 402, 406-07 (Mo. Ct. App. 1975) (right to resume birth name after using husband's surname).
137. Stuart v. Board of Supervisors, 266 Md. 440, 295 A.2d 223 (1972) (Maryland Court of Appeals held that the statute requiring the filing of former and present names changed by marriage did not abrogate the common law). See generally MacDougall, supra note 125.
139. E.g., Kruzel v. Podell, 67 Wis. 2d 138, 226 N.W.2d 458, 466 (1975).
141. Ogle v. Circuit Court, 89 S.D. 18, 23, 227 N.W.2d 621, 624-25 (1975); In re Harris, 236 S.E.2d 426, 430 (W. Va. 1977).
to sue for a divorce in a surname different from the husband’s. These rights accrued to a woman as a wife or as an ex-wife.

Some courts have similarly interpreted a woman’s right to her own name as an individual right, regardless of her status as a mother. Yet, this perspective may assume that the mother acts in the child’s best interest when deciding to use her birth name.

The right of a mother or father, a wife or a husband, to her or his own name is thus as broad as the courts’ interpretation of the common law and statutes. Litigation in the 1970s reveals that the common law and statutes protected a woman’s right to her name during a marriage. Within the marriage each spouse had a right to his or her name. The interpretation of common law also supported recognition of a woman’s right to use her husband’s name that she had adopted as her own even after a divorce.

3. The Paternal and Maternal Right to Due Process and Equal Protection

When divorce involves a family of three or more or when a father acknowledges paternity, courts have analyzed the paternal and maternal rights involved in the legal proceedings for a child’s name change.


145. The woman’s right to her own name appeared as an individual right based on the common law freedom to choose a name absent fraudulent purpose. MacDougall, supra note 125, at 3.


147. When a woman has the right to use her own name, some couples agree that their future children will receive the paternal name to alleviate any judicial fear that a child will not receive the traditional paternal surname. In re Miller, 218 Va. 939, 243 S.E.2d 464, 467 (1978); In re Strikwerda, 216 Va. 470, 220 S.E.2d 245, 246 (1975). An Illinois court, however, has explicitly rejected the idea that a mother’s right to her own name is related to the child’s best interests:

The best interests of the child are to be considered by the trial court in selecting the custodial parent. The name which the parent uses has not been held to be one of the relevant factors. The welfare of the child becomes an important consideration where the custodial parent petitions to change the name of the minor child [citations omitted], but not where the custodial parent seeks to change his or her own name.


148. See Comment, Name Game, supra note 13, at 143-58.


150. See generally Annot., supra note 6.

151. See infra notes 162-64 and accompanying text.

152. Most name cases concern changing a child’s name. See generally Annot., supra note 6. But see
Courts, when considering the traditional paternal naming right, have used various adjectives to describe the legal significance of a name. In examining the nature of the father's naming right the Supreme Court of Oklahoma in In re Tubbs stated that "quality of notice that is a person's due is determined by the essential character of the interest sought to be affected." In noting that "personal rights [are] more precious than those of property" the Tubbs court held the father's liberty interest made service by publication void. It narrowed this holding, however, requiring personal notice only when the father's whereabouts are "known or readily ascertainable." The Tubbs court recognized that other courts have not found the paternal naming right to be a property right protected by the due process clause of the Constitution. The court nonetheless found that the father had a liberty interest because the paternal naming right is similar to essential rights, basic civil rights, and fundamental rights. The court stated that the interest arising from the parental bond is the subject of constitutional protection under both the due process and equal protection clauses.

When courts recognize a maternal liberty interest protected by the due process clause and the equal protection clause, the

infra text accompanying notes 186-97 for a discussion of the parents' right to select a child's birth name.

153. The Supreme Court of Oklahoma expressed the traditional deference toward the father's preference as "a natural right, a fundamental right, a primary or time-honored right, a common-law right, a protectible interest, and even a legal right." In re Tubbs, 620 P.2d 384, 386 (Okla. 1980). See Carroll v. Johnson, 263 Ark. 280, 565 S.W.2d 10 (1978) (change of minor child's name without notice to noncustodial parent deprived parent of due process of law); Fulghum v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1972) (publication of proposed change of child's name was sufficient notice to father who has a protectible interest).

Courts usually consider the paternal preference rather than the maternal preference because in most situations the married parents give the child the father's name. Yet, "[t]here are no reported cases to the knowledge of [attorney Priscilla Ruth MacDougall] which involve a man's trying to change the name of his marital child given its mother's name at birth when he has custody of the child. Nor is there any such case when the man does not have custody." Petitioner's Brief for Certiorari at 26, In re Saxton, 309 N.W.2d 298 (Minn. 1981), cert. denied, 102 S. Ct. 1737 (1982).

154. 620 P.2d 384 (Okla. 1980).


156. Id. But see Lynch v. Household Finance Corp., 405 U.S. 538 (1972). The Lynch court reasoned that "[t]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights." Id. at 552.

157. 620 P.2d at 388.

158. Id. See Hardy v. Hardy, 269 Md. App. 412, 306 A.2d 244 (Ct. Spec. App. 1973) (remanded because publication was waived when whereabouts of father was known).

159. 620 P.2d at 387. See Fulghum v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1972). The Fulghum court stated the following:

"[T]his protectible interest is not a property right which comes within the meaning of the due process clauses of the State and Federal Constitutions. In our opinion such interest necessarily is taken into consideration by the trial court in . . . carrying out its duty of acting in the best interests of the child as parens patriae.

229 Ga. at ___, 192 S.E.2d at 378.


161. Id.

context is usually a paternity proceeding. Statutes that automatically name a child with the father’s surname upon recognition of paternity violate the mother’s right to notice and equal protection.

Courts therefore require that both the father and mother receive notice of a name change. This requirement, however, is not inconsistent with the custodial parent presumption, although according to the theoretical framework the noncustodial parent would presume that the custodial parent has the right to change a child’s name. The requirement of notice is comparable to the statutory requirement of notice to third parties, even though the petitioner has a common law right to adopt any nonfraudulent name. In addition, the requirement of notice to the noncustodial parent would mitigate the noncustodial’s concern that the child’s name would be surreptitiously changed. Notice would therefore protect a parent’s constitutional right to due process and equal protection and lessen a noncustodial parent’s apprehension.

4. *The Parental Right to Name*

Even if a parent does have a constitutional right to procedural due process and equal protection, the constitutional right of family autonomy and privacy give support to the custodial parent’s presumptive naming right. In order to recognize the relationship between the custodial parent’s right to make significant decisions about the child’s welfare and the presumptive right to select a name for his or her child, courts will accept the custodial parent’s naming right if they discern that naming is an incident of custody.

Courts will grant constitutional protection to the custodial parent’s decision if they view the custodial parent and child as a family to which the constitutional rights of family autonomy and privacy accrue.

a. *Naming as an Incident of Custody*

See supra text accompanying notes 15-19. See infra text accompanying notes 171-83.

See infra text accompanying notes 102-11. See supra text accompanying notes 150-64. See infra text accompanying notes 186-201. See supra text accompanying notes 171-83.
Courts may be reluctant to accept the proposition that naming is an incident of custody because granting the custodial parent the presumptive right to select a name for a child might make the determination of custody more difficult. But courts have faced similar problems in deciding which parent will be the custodial parent and who will therefore have the right to control the child's development. By separating the naming right from the other incidents of custody, courts have in effect fostered litigation. As one court noted, "the chances of [children] developing emotional problems as they grow up increases in direct proportion to the thickness of the file involved in a divorce case." Two facts support the proposition that naming is an incident of custody.

First, noncustodial parents often invoke a court's jurisdiction by using divorce or separation decrees. An Illinois court explicitly stated that "a change of name of a minor child of divorced parents is [a] matter incidental to the custody." Second, the nature of the relationship between the custodial parent and the child indicates that the custodial parent guides the child's development. Yet, courts that have upheld the traditional paternal naming preference have used this fact, not to support the custodial parent's decision, but rather to find that custody weakened the bond between the noncustodial parent and child. When these courts interpret the effect of custody as detrimental, they assume that the name creates the bond between the absent noncustodial parent and child, a bond they often describe as tenuous at best. Yet, in few appellate name dispute cases have the fathers who have wanted their children to retain their surnames sought custody. In some cases these fathers were even reluctant

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171. See, e.g., Cohee v. Cohee, 210 Neb. 855, 317 N.W.2d 381 (1982) (no presumption exists in favor of the custodial parent, but custody is a factor in determining the best interests of the child); Ex parte Stull, ___ S.C. ___, 280 S.E.2d 209 (1981) (remanded to determine whether the proposed name change "is actually the minor's decision rather than that of his custodial parent"). But see State ex rel. Spence-Chapin Servs. to Families & Children v. Tedeno, 101 Misc. 2d 485, 421 N.Y.S.2d 297 (Sup. Ct. 1979) ("the mother has custody and it is she who will ... make major decisions").

172. See Devine v. Devine, 398 So. 2d 686, 696 (Ala. 1981) (court discards tender years presumption even though the presumption is an "anodyne" for the difficult decisions confronting the court in custody proceedings).

173. See supra note 99 and accompanying text.


175. See, e.g., Annot., supra note 6, at 1118-23 (incident to divorce and separation proceedings). But see Hurta v. Hurta, 25 Wash. App. 95, 605 P.2d 1278 (Ct. App. 1979) (no jurisdiction subsequent to dissolution); Annot., supra note 6, at 1107-18, 1123-26 (jurisdiction present in extraordinary relief).


177. See supra text accompanying notes 16-19.

178. See supra text accompanying notes 26-42.


to acknowledge paternity.\textsuperscript{181}

The relationship between the custodial parent and child, however, is built upon the custodial parent’s right to direct the child’s development — psychological, educational, and religious.\textsuperscript{182} Because a name can have psychological, educational, and religious significance,\textsuperscript{183} a custodial parent should also determine a child’s name. The selection of a name would thus be one aspect of the custodial parent’s duty to direct the development of a child’s identity.

b. The Custodial Parent and Child as a Family

The phrase “‘broken home’” is a common expression used to describe a family that experienced divorce. While this expression indicates that a child’s parents live in separate residences, the metaphor does not account for the daily responsibilities that a custodial parent possesses. The central reason for recognizing the custodial parent and child as a family is the similarity between the autonomous acts of a custodial parent and the autonomous acts of parents.\textsuperscript{184} Although this reason is logically intertwined with the recognition of naming as an incident of custody,\textsuperscript{185} it is distinguishable in this context because the emphasis is on the custodial parent’s authority to act, not upon the individual decisions that a custodial parent makes. A discussion of the authority vested in parents reveals the similar authority of the custodial parent.

Three cases describe the protection afforded to parents in selecting a name for their child. In Secretary of Commonwealth v. City Clerk of Lowell\textsuperscript{186} the Supreme Court of Massachusetts in 1977 declared unlawful the town clerk’s refusal to follow the three state attorney general opinions that recognized the common law freedom to select any nonfraudulent name.\textsuperscript{187} The court held that the common law protected the parents’ decision.\textsuperscript{188} The naming right

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\item \textsuperscript{181}See Cohee v. Cohee, 210 Neb. 855, 317 N.W.2d 381 (1982).
\item \textsuperscript{182}See supra text accompanying notes 16-19.
\item \textsuperscript{183}Some psychologists have conducted studies of children’s names. See Busse, Identical First Names for Parent and Child, 107 J. Soc. Psych. 293 (1979); Eagleson, Students’ Reactions to Their Given Names, 23 J. Soc. Psych. 187 (1946); Ellis & Beechley, Emotional Disturbance in Children with Peculiar Given Names, 85 J. Genetic Psych. 337 (1954); Nelson, First-Name Stereotypes and Expected Academic Achievement of Students, 41 Psych. Rep. 1343 (1977).
\item \textsuperscript{184}A name also has cultural and educational significance. See, e.g., Note, supra note 12, at 303 (a name may instruct children in familial and societal values).
\item \textsuperscript{185}See infra text accompanying notes 186-201.
\item \textsuperscript{186}373 Mass. 178, 366 N.E.2d 717 (1977).
\item \textsuperscript{187}Secretary of Commonwealth v. City Clerk, 373 Mass. 178, ___, 366 N.E.2d 717, 722 (1977).
\item \textsuperscript{188}Id. at ___, 366 N.E.2d at 725.
\end{itemize}
was even sufficiently broad to protect a foolish decision. The court stated that the "[p]arents' claim to authority in their own household to direct the rearing of their children is basic to the structure of society." Two years later in *Jech v. Burch*, a federal district court in Hawaii recognized that this common law freedom was protected by the fourteenth amendment. Even though the court noted that no case had previously dealt with the constitutional dimensions of naming, it found that the "naming of one's own child comes with this [the preamble of the Constitution] catalogue of blessings of liberty." The court therefore protected the parents' right to give their child a name derived from both their surnames.

*Jech* was found controlling in the 1981 decision of *O'Brien v. Tilson*. A district court in North Carolina held that a statute which required children of married parents to be given their father's surname was unconstitutional because it infringed upon the important constitutional interests affecting family life, procreation, child rearing, privacy, and individual expression.

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189. *Id.* at __, 366 N.E.2d at 724.
190. *Id.* at __, 366 N.E.2d at 723. A case comment summarizes the liberty afforded to parents in this case:

"[T]his decision extended the common law principle of freedom to choose a name to include the right of parents to give their child whatever surname they desire, including one not borne by either parent. It became a "short step" for the court to approve the use of a hyphenated version of both parents surnames in the recording of a child's surname. This freedom and authority stems from the concept of family autonomy." Comment, *Recording of Surnames — Clerks Have No Authority to Inhibit the Rights of Individuals to Choose Their Own and Their Children's Surnames. Secretary of the Commonwealth v. City Clerk of Lowell*, 13 New Eng. L. Rev. 588, 593 (1977) (footnotes omitted).

192. *Jech v. Burch*, 466 F. Supp. 714, 719 (D. Hawaii 1979). The court stated that "a proper interpretation of Anglo-American political and legal history and precedent leads to the conclusion that parents have a common law right to give their child any name they wish, and that the Fourteenth Amendment protects this right from arbitrary state action." *Id.* The court further explained that "the statutory provision for a name change is not a substitute for the right to insist that one's child at birth was given the original name designated." *Id.* at 720 (emphasis in original).

193. *Id.* at 719.
194. *Id.* To support recognition of the parents' constitutional naming right, a right derived from the rights to liberty and privacy, the district court cited the following cases: Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977) (foster parents may have a protected liberty interest); Cleveland Board of Educ. v. LaFleur, 414 U.S. 632 (1974) (right of pregnant woman to continue working); Roe v. Wade, 410 U.S. 113 (1973) (right to terminate pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraceptives); and Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach children a foreign language).

195. 466 F. Supp. at 721. Parents named their child "Jebef," a combination of *Jech* and Befurt. *Id.*
197. *O'Brien v. Tilson*, 523 F. Supp. 494, 496 (E.D.N.C. 1981). The court stated that the interest of the Registrar of Vital Statistics could be one of developing a filing system that identifies children by "A-1, A-2, and A-3, or Huey, Duey and Louey" as long as parents have the right to choose the child's surname at birth. *Id.* at 497. *See Rice v. Department of Health and Rehab. Servs.*, 386 So. 2d 844 (Fla. Dist. Ct. App. 1980). The *Rice* court, though remanding to an agency before reaching the constitutional question, articulated the factors to be considered in examining the constitutionality of a statute requiring the father's name to be given at birth. *Id.* at 849-50. The dissent vehemently criticized the decision to remand: "What is to be lost is obvious: time, money..."
Although these three cases involve parents who agree on the name of their child, the cases nonetheless support recognition of the custodial parent’s right to select a name because the cases the courts cited to support the holdings give broad deference to family autonomy.198 Cases that protect parental authority in the areas of education and religion199 support the custodial parent presumption because this authority is vested in the custodial parent.200 The Supreme Court recently reaffirmed the family’s special status in stating that “freedom of personal choice in matters of family life . . . [is] a fundamental liberty interest protected by the Fourteenth Amendment.”201

The custodial parent and child are a family because of the degree of control that the custodial parent exercises.202 At common law this control would give the custodial parent the title of “head of household.”203 As head of household the custodial parent would have the exclusive right to determine the surname of legitimate children.204 But courts used the title almost exclusively in relationship to men,205 even if they did not live at home, did not support the family, or were supported by their wives.206 The advent of the Married Women’s Property Act, however, freed women from this legally inferior status.207 The recognition of the custodial parent presumption would similarly discard the implicit preference of male control in naming under the guise of preserving a paternal bond.208 With the abolition of the tender years doctrine that preserved the anachronistic, sex-stereotype view that a mother was presumptively a better parent for a young child,209 courts can therefore be free of both stereotypes that interfere with ascertaining the child’s best interest — the focus of their inquiry in determining

and peace-of-mind for individuals relegated by the majority to the administrative morass.’’ Id. at 854.

200. See supra text accompanying notes 73-77.
202. See supra notes 16-19, 184-97 and accompanying text.
203. Carlsson, supra note 37, at 563.
204. Carlsson, supra note 37, at 563.
205. Carlsson, supra note 37, at 563-68.
206. Carlsson, supra note 37, at 563-68.
208. See supra text accompanying notes 27-42.
209. See supra notes 79-85 and accompanying text.
custody. Once the court determines custody, the right to family autonomy would therefore vest in the custodial parent.

IV. A COURT'S USE OF THE CUSTODIAL PARENT PRESUMPTION

To employ the custodial parent presumption a court must first determine who is the custodial parent. After such a determination a court must weigh the evidence offered by the noncustodial parent that shows new facts and changed circumstances subsequent to the custody determination. Both steps present a court with different degrees of difficulties depending upon specific facts.

A. Determining the Custodial Parent

The problem of ascertaining who has custody, though seemingly resolved at the original custody determination, arises from the theory that custody is a bundle of rights and responsibilities. When a parent abandons a child the parent is noncustodial because no ties bind the child and the parent. But when a parent has a right to visitation a court may determine custody by clocking the amount of time a child spends with a parent or by considering the quality of that time, namely whether the parent provides what is traditionally described as a home.

If parents equally provide a home for the child, then the court may consider the factor of financial responsibility. A court, however, should not consider this factor if the previous marriage adversely influenced the present economic status of an individual.

210. See Justice v. Hobbs, 245 Iowa 707, 63 N.W.2d 882 (1954) ("custody" is a slippery word).
213. Abandonment demands definition, for one of the residual parental rights that remains after custody is placed in another includes the right to have the child bear the parent's name. L.A.M. v. State, 547 P.2d 827, 833 n.13 (Alaska 1976).
214. But see M. MORGENBESSER & N. NEHLS, JOINT CUSTODY 30 (1981) ("[t]he central issue [in joint custody] is not how much time the child spends with each parent but that the two parents have equal rights and responsibilities for childrearing.").
216. The act of quantifying time spent with each parent may ignore the reality of childrearing, for a child who is at least five years old may have the opportunity to be with the noncustodial parent only during summer vacation. M. MORGENBESSER & N. NEHLS, supra note 214, at 30.
217. Some courts have explicitly recognized the factor of financial responsibility in terms of the traditional paternal preference. See, e.g., In re Harris, 236 S.E.2d 426 (W. Va. 1977) ("The weight of authority appears to be that absent extreme circumstances a father who exercises his parental rights has a protectable interest in his children bearing his surname and this interest is one quid pro quo of his reciprocal obligation of support and maintenance.").
parent\textsuperscript{218} or if this factor does not directly relate to the essential nurturing quality of a parent.\textsuperscript{219} Therefore, the determination of custody theoretically appears as a continuum, with one end symbolizing abandonment and the other, equal responsibilities.

In practice the issue of who is the custodial parent is generally resolved by a court’s requiring proof of legal custody demonstrated by a previous court order or proof of actual custody documented by an affidavit.\textsuperscript{220} When a court decree indicates an award of joint custody the custodial parent presumption would be inapplicable and a court would determine the child’s best interests. But once it finds custody vested in one parent, a court would next address the noncustodial parent’s burden of proof necessary to rebut the presumption that the custodial parent acts in the child’s best interests.

B. Determining New Facts and Changed Circumstances

Once the court ascertains who is the custodial parent, it must determine whether “new facts and changed circumstances” exist subsequent to the original custody order.\textsuperscript{221} This issue can also be expressed in other terms, either specifically as described in custody statutes or case law\textsuperscript{222} or generally as “against the child’s best interest” because the custodial parent presumptively acts in the child’s best interest.\textsuperscript{223} Two circumstances suggest a decided change in the status quo — remarriage and relocation.\textsuperscript{224}

Remarriage by the custodial parent not only provides a child with a stepparent but may also offer siblings from the new parent’s

\textsuperscript{218} The thesis of Uviller’s article is that the standard for custody should be based upon each party’s sacrifice of time and energy during the marriage. Uviller, \textit{supra} note 5, at 112. Uviller also notes that other factors would unduly influence the award of custody to the male parent: financial consideration, amount of education, and possibility of remarriage. Uviller, \textit{supra} note 5, at 112.

\textsuperscript{219} Psychologists Goldstein, Freud, and Solnit describe the psychological parent as “one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child’s psychological needs for a parent, as well as the child’s physical needs.” \textsc{J. Goldstein, A. Freud & A. Solnit, supra note 99, at 98.}

\textsuperscript{220} When a court receives affidavits from both parents, it may resolve the issue based on its theory of custody. \textit{See supra} text accompanying notes 212-19. A court may also view the parents as having joint custody. \textit{See supra} note 214.

\textsuperscript{221} “New facts and changed circumstances” is the standard in California for considering a change in custody. \textit{In re} Marriage of Carney, 24 Cal. 3d 725, 730, 598 P.2d 36, 39, 157 Cal. Rptr. 383, 385 (1979).

\textsuperscript{222} \textit{See, e.g.,} \textsc{Unif. Marriage \& Divorce Act \S 409} (1979) (previously unknown facts or change in circumstances of child or custodian, and modification necessary to serve best interest of child); \textit{In re} Wheat, 68 Ill. App. 3d 471, 386 N.E.2d 278 (App. Ct. 1979) (substantially changed circumstances).

\textsuperscript{223} \textit{In re} Schiffman, 28 Cal. 3d 640, 648, 620 P.2d 579, 584, 169 Cal. Rptr. 918, 923 (1980) (Mosk, J., concurring).

\textsuperscript{224} Authors Morgenbesser and Nehls specifically mention remarriage and relocation as two circumstances that create problems in joint custody cases. \textsc{M. Morgenbesser \& N. Nehls, Joint Custody 111-18} (1981). The authors, who advocate joint custody, unfortunately do not describe how a court should address these problems.
previous marriage or from the new marriage.\textsuperscript{225} The remarriage of the noncustodial parent may similarly result in new relationships, yet those relationships may not have the same effect on the child’s immediate social environment.\textsuperscript{226}

A change in the physical environment through relocation of either parent affects the bond between the noncustodial parent and child.\textsuperscript{227} To consider this circumstance in the context of who initiates the move may impair the constitutional rights of family autonomy\textsuperscript{228} and travel.\textsuperscript{229}

Although both remarriage and relocation do alter the status quo, the court may interpret these circumstances differently. When the custodial parent remarries or relocates the court may support the presumption by assuming that the custodial parent will continue to act in the child’s best interest.\textsuperscript{230} This interpretation of the status quo examines the custodial parent’s ability to make significant decisions, not the environment of the child. If a court relates the status quo to a child’s environment, then it would consider how the custodial parent’s remarriage or relocation affects the child’s environment.

When the noncustodial parent remarries the court may require other evidence of a change in the status quo because this remarriage may have a less direct impact upon the child.\textsuperscript{231} When the noncustodial parent relocates the court may evaluate the continuing vitality of the noncustodial parent-child bond in light of its previous character.\textsuperscript{232} A court’s consideration of the bond between the noncustodial parent and child signifies that it interprets the status quo as a change in a child’s environment, not as a question of the custodial parent’s ability to act in the child’s best interest.\textsuperscript{233}

\textsuperscript{225} An analysis of how remarriage affects a child logically must encompass the specific facts of each case. How a court interprets the facts depends upon its interpretation of what constitutes a “family.” See supra text accompanying notes 202-09.

\textsuperscript{226} See supra text accompanying notes 202-04.


\textsuperscript{229} The right to travel interstate is grounded upon the privileges and immunities clause of article IV, section 2 of the United States Constitution, Paul v. Virginia, 75 U. S. (8 Wall) 168, 180 (1868); Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3230).

\textsuperscript{230} For a discussion of the significance of presumptions, see supra note 62.

\textsuperscript{231} The amount of weight a court gives to the fact of remarriage depends upon its interpretation of presumptions. See supra note 62.

\textsuperscript{232} A court’s consideration of the previous character relates to Uviller’s thesis that the court should originally award custody on the basis of the sacrifice of time and energy during the marriage. Uviller, supra note 5, at 117-30.

\textsuperscript{233} This interpretation of the status quo would similarly affect a court’s evaluation of the custodial parent’s remarriage or relocation.
The facts of each case thus invite judicial discretion when the court must define custody and new circumstances. Discretion does not, however, necessarily invoke a balancing process that undermines the custodial parent presumption’s value in keeping quarrelling parents from seeking vexatious suits. An inference would afford too little protection to a child used as a pawn by angry parents, while a conclusive presumption would probably be an unconstitutional infringement of liberty. The gender neutral language of the custodial parent presumption is also consistent not only with recent decisions concerning sex discrimination but also with the advancement of women’s rights in the 1970s.

A disadvantage of the model may be that the practical application mandates judicial discretion. Yet, judicial discretion may be viewed as a necessary element in the area of domestic relations, where each family offers unique circumstances. The custodial parent presumption provides a structure for such judicial discretion. The presumption is therefore one that is rebuttable yet possesses substance.

V. CONCLUSION

A court may resolve the controversy over a child’s name by

234. See supra note 99 and accompanying text.
236. Inferences are defined as “deductions or conclusions which with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.” Black’s Law Dictionary 700 (5th ed. 1979).
237. A conclusive presumption is defined as “[a]n artificially compelling force which requires [the] trier of fact to find such fact as is conclusively presumed and which renders evidence to the contrary inadmissible.” Id. at 263.
238. See, e.g., Roe v. Conn, 417 F. Supp. 769 (M.D. Ala. 1976). The Alabama court held that an illegitimate child’s liberty interest was unconstitutionally infringed upon by the complete control in naming that a father possesses when legally acknowledging paternity. The court further stated that the father’s absolute right undermined family integrity and served no legitimate state interest in administrative convenience. Id. at 782-83.
239. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973) (classifications based on sex are inherently suspect and therefore must be subjected to close judicial scrutiny).
240. See, e.g., Kruzel v. Podell, 67 Wis. 2d at __ , 226 N.W.2d at 463 (“[t]he common law ... has never ossified to the point of holding that a wife is required to take her husband’s name.”)
241. See supra notes 109-14 and accompanying text.
242. Legislative adoption would be preferable to judicial acceptance of the custodial parent presumption because noncustodial parents would have explicit notice at the divorce proceeding that abolition of the paternal preference in naming and of the tender years doctrine allows acceptance of the logical proposition that naming is an incident of custody. See supra text accompanying notes 171-83.

A custodial parent may stipulate in the divorce decree that the child’s name will not be changed. Yet such an agreement treats the naming right as a right distinct from the incidents of custody and fails to account for circumstances that would prompt the custodial parent to change a child’s name in accordance with the belief that a change is then in the child’s best interests. See supra text accompanying notes 68-72. The agreement would also infringe on the right to family autonomy. See supra text accompanying notes 186-201.
employing the custodial parent presumption. This concept creates a rebuttable presumption: the custodial parent, who presumptively acts in the child’s best interest, has the right to select or change a child’s name, unless the noncustodial parent can show new facts or changed circumstances that would bar such a change. The presumption protects the custodial parent’s naming decision because, like other important decisions that a custodial parent makes, the choice of a name is a significant decision with legal significance.

The history of name change litigation reveals not only the significance of a name but also suggests that judicial acceptance of the custodial parent presumption builds from this historical foundation. For a court to employ the custodial parent presumption in resolving a naming dispute, it would engage in a two-step process: the determination of who is the custodial parent and of what constitutes new facts or changed circumstances. Because these steps require factual inquiry, a court would have discretion in interpreting the specific circumstances of each case. The custodial parent presumption, affording a court the opportunity to consider the unique factors of the family naming dispute, provides a court with an approach that seeks to protect a child’s best interest.

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